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No. 94-168

In the Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD F. SPRAGUE, PETITIONER

v.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Office of Personnel Management's selection of a method for converting federal administrative law judges' salaries from the government's General Schedule to a separate pay system created by statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 23 F.3d 185. The opinion of the district court is reported at 825 F. Supp. 1324.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1994. A petition for rehearing was denied on July 5, 1994. The petition for a writ of certiorari was filed on July 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1990, the Office of Personnel Management (OPM) determined salaries for administrative law judges (ALJs) on the basis of the General Schedule (GS), which establishes the rate of basic pay for most federal employees. See 5 U.S.C. 5101-5102, 5104, 5372 (1988). Under the General Schedule, OPM categorized ALJ positions on the basis of their "level of difficulty, responsibility, and qualification requirements." 5 U.S.C. 5106(b). While many ALJ positions were paid at the GS-16 level, OPM classified administrative judgeships in the Social Security Administration as GS-15 positions. As the district court noted, OPM explained the difference in classification on the ground that Social Security cases were generally "less complex[,] * * * not as vigorously contested * * *, and * * * non-adversarial." *Sprague* v. *King*, 825 F. Supp. 1324, 1327 n.1 (N.D. Ill. 1993); see also Pet. App. 1a.

The Federal Employees Pay Comparability Act of 1990 amended 5 U.S.C. 5372 to create a special pay scale, separate from the General Schedule, for administrative law judges. Treasury, Postal Service and General Government Appropriations Act of 1991, Pub. L. No. 101-509, sec. 529 (Federal Employees Pay Comparability Act of 1990), § 104, 104 Stat. 1427, 1445-1446. The Act creates three compensation categories for ALJs: AL-1, AL-2, and AL-3. The basic (non-supervisory) category, AL-3, is further subdivided into six levels, A through F. ALJs at each level receive salaries ranging, in 5% intervals, from 65% to 90% of the rate of basic pay established for Level IV of the Executive Schedule. 5 U.S.C. 5372(b)(1) (Supp. V 1993). An ALJ appointed to an AL-3 position normally starts at level A, advancing one level each year through level D, and then one level every two years through

level F. 5 U.S.C. 5372(b)(2) (Supp. V 1993). An ALJ who reaches AL-3, level F, will remain there indefinitely unless subsequently appointed to a supervisory position classified as AL-2 or AL-1.

The 1990 Act directed OPM to prescribe necessary regulations and to determine "the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level." 5 U.S.C. 5372(b)(2), 5372(c) (Supp. V 1993). While new ALJs in AL-3 jobs normally start at level A, the statute provides that OPM may provide for their appointment at an advanced rate "under such circumstances as the Office may determine appropriate." 5 U.S.C. 5372(b)(3)(B) (Supp. V 1993). With respect to conversion from the General Schedule to the new AL scale, the statute provides only that after the "initial pay adjustments" required by the transition, "the rate of basic pay for any [ALJ] shall, upon conversion to the new pay system, be at least equal to the rate which was payable to that individual immediately before such conversion." Pub. L. 101-509, § 104(e), 104 Stat. 1447 (reproduced at 5 U.S.C. 5372 note (Supp. V 1993)).

In early 1991, OPM published regulations designed to implement the new AL scale. 56 Fed. Reg. 6208 (1991) (interim regulations); see also 57 Fed. Reg. 1367 (1992) (final regulations); 5 C.F.R. 930.210. The regulations placed ALJs on the new schedule on the basis of their former General Schedule pay rates. ALJs at the GS-15 level were assigned to AL-3 rates A, B, C, and D, depending on how far advanced they were on the "steps" within the GS-15 category. ALJs at the GS-16 level were placed at AL-3 rates C, D, E, and F, again depending on their steps within GS-16. Chief and Deputy Chief ALJs were converted to levels AL-1 and AL-2, respectively. 56 Fed. Reg. 6210 (1991); 5 C.F.R. 930.210(d) and (k). As

required by the statute's conversion provision, the regulations ensured that all salaries payable after the conversion would at least equal those payable immediately before it. 56 Fed. Reg. 6210 (1991); 5 C.F.R. 930.210(j).

2. Petitioner and 25 other ALJs employed by the Social Security Administration filed suit to challenge the conversion method adopted by OPM.[1] The suit contended that one purpose of adopting the new AL schedule was to eliminate the distinction between GS-15 and GS-16 ALJ positions, and that basing conversion on each ALJ's prior position on the General Schedule improperly perpetuated that distinction. *Sprague*, 825 F. Supp. at 1327-1328.

The district court dismissed the ALJs' complaint, ruling (825 F. Supp. at 1329-1333) that the method of converting ALJs from the General Schedule to the new AL scale was "committed to agency discretion by law," 5 U.S.C. 701(a)(2), leaving "no law for the court to apply" in reviewing the choices made by OPM in exercising that discretion. 825 F. Supp. at 1333; see *Heckler* v. *Chaney*, 470 U.S. 821, 827-835 (1985). Alternatively, the district court ruled that even if judicial review were available, it would not find OPM's conversion regulations arbitrary or capricious. 825 F. Supp. at 1333-1335.

The court of appeals affirmed. Pet. App. 1a-8a. The court noted (*id.* at 6a) that Congress imposed only one restriction on the conversion: that no ALJ's salary could be decreased. Beyond that, the 1990 Act left initial placement of ALJs on the new pay scale entirely to OPM. *Ibid.* The court rejected (*id.* at 7a) the ALJs' argument

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[1] So far as appears, none of the other plaintiffs has joined petitioner in seeking review of the court of appeals' decision in this case.

that OPM had contravened a congressional intention, disclosed by the legislative history of the 1990 Act, to eliminate at once any systematic distinction between ALJs working at different agencies. The court concluded (*id.* at 7a-8a) that OPM did not act arbitrarily by providing for a transition during which the distinction between positions classified as GS-15 and those classified as GS-16 would, in effect, be phased out over the first seven years of operation under the new AL scale.

ARGUMENT

1. As the court of appeals recognized (Pet. App. 5a-6a), the 1990 Act imposed only one requirement with respect to the conversion of ALJ positions from the General Schedule to the new AL scale: that the transition should not reduce the compensation of any incumbent ALJ. Beyond that, Congress directed only that OPM should "determine, in accordance with procedures which the Office shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level." 5 U.S.C. 5372(b)(2) (Supp. V 1993). The statutory language provides "no meaningful standard against which to judge the agency's exercise of discretion" in determining the details of the transition.[2] *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). That determination was therefore "committed to agency discretion by law" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 701(a)(2), and the

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[2] When Congress wishes to provide more detailed instructions for conversion from one pay system to another, it knows how to do so. See, *e.g.*, Performance Management and Recognition System Termination Act, Pub. L. No. 103-89, § 4, 107 Stat. 983 (1993) (conversion from Performance Management system to General Schedule).

courts below properly refused to disturb OPM's exercise of that discretion. See *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988); see also *Greater New York Hosp. Ass'n* v. *Mathews*, 536 F.2d 494, 497 (2d Cir. 1976); *Ness Inv. Corp.* v. *United States Dep't of Agriculture*, 512 F.2d 706, 715 (9th Cir. 1975).

Petitioner argues (Pet. 7-9, 11-13) that the structure and history of the 1990 Act reveal an "implicit" congressional intention (Pet. 11, 13) that all distinctions among ALJ positions at different agencies be eliminated immediately by converting all ALJs to the new pay scale solely on the basis of seniority. The statute itself, however, specifies only how ALJs are to progress along the new AL scale once they have been appointed. See 5 U.S.C. 5372(b)(3)(A) (Supp. V 1993). That provision ensures that all non-supervisory ALJs will earn the same salary within eight years after their appointment, but it implies nothing about where individual ALJs will be placed on the scale at the time of their initial employment. Indeed, Section 5372(b)(3)(B) (Supp. V 1993) specifies that OPM "may provide for appointment of an administrative law judge in AL-3 at an advanced rate under such circumstances as the Office may determine appropriate." Thus, as the court of appeals pointed out (Pet. App. 6a), what the structure of the statute reveals is that "Congress * * * determined that the *terminal* salaries of ALJs should not vary by agency; but the fixing of *initial* salaries has been left to the OPM."

As to legislative history, the only committee report on the legislation enacted in 1990 does not refer to creation of the new ALJ pay scale at all, let alone dicuss procedures for conversion. See H.R. Rep. No. 906, 101st Cong., 2d Sess. 87-92 (1990). Nor was the conversion process discussed during hearings held on predecessor bills. See *Federal Employees Pay Comparability Act of*

1990: Hearings on H.R. 3979 and H.R. 4716 Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 101st Cong., 2d Sess. (1990) (hereinafter *House Hearings*); *Civil Service Pay Reform: Hearings on S. 2274 Before the Senate Comm. on Governmental Affairs*, 101st Cong., 2d Sess. (1990) (hereinafter *Senate Hearings*). The House hearings contain discussion of the pay distinction among ALJ positions, but even some of those who supported abolition of the distinction emphasized that their "preeminent concern" was not elimination of that distinction but rather the creation of a distinct ALJ pay scale linked to the Executive Schedule. *House Hearings* 62-85, 111-117, 116. Submissions by ALJs to the Senate committee never broached the subject of eliminating the GS-15/GS-16 distinction; indeed, the ALJs' proposals to the Senate explicitly perpetuated the distinction. See *Senate Hearings* 219, 221, 229-230, 254-255.

Petitioner argues (Pet. 2-3, 8-9) that the evolution of the legislation that eventually became the 1990 Act shows that Congress intended immediate elimination of any pay disparities among ALJs in different agencies. As the district court concluded, however, during consideration of the pay issue "each body of Congress defined, discarded, reintroduced, amended, and redefined the concepts which ultimately manifested themselves as the current § 5372"; thus, "very little can be gleaned from the proposed amendments to § 5372 that were not enacted." *Sprague* v. *King*, 825 F. Supp. at 1332. The best evidence of congressional intention is the language of the statute finally enacted. As the court of appeals pointed out (Pet. App. 2a), "[t]he text that emerged from the give-and-take of politics" provided only that no ALJ should have his or her salary reduced by the conversion

process. Petitioner does not claim that OPM breached that requirement, and his citations to legislative history do not demonstrate any other congressional constraint on OPM's discretion in arranging for the conversion.

2. The district court also held, in the alternative, that OPM's selection of a conversion method was not arbitrary, capricious or an abuse of discretion within the meaning of the Administrative Procedure Act. *Sprague* v. *King*, 825 F. Supp. at 1333-1335; see 5 U.S.C. 706. As OPM noted in responding to comments on its interim conversion regulations and adopting them in final form, the change in systems required converting ALJs from 25 different pay rates under the General Schedule to eight rates at the three levels of the new AL scale. See 57 Fed. Reg. 1368 (1992). OPM explained that its aim in designing the conversion was "to follow congressional intent as much as possible by establishing a new pay system * * * that would be fair and equitable to the largest number of judges at the earliest practicable date and still be consistent with [the statute] and long-standing personnel management practices regarding advancement." *Ibid.* Such decisions are ones in which courts are properly reluctant to interfere. See, *e.g.*, *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 137 (1953); *Barnhart* v. *Devine*, 771 F.2d 1515, 1522 (D.C. Cir. 1985).

Under the old system, each ALJ's placement on the General Schedule reflected not only classification of the position to level GS-15 or level GS-16 and the individual's seniority, but also a variety of other factors, including prior experience or special qualifications or circumstances. OPM might have moved all ALJs to the new scale purely on the basis of seniority (as petitioner suggests), thus eliminating all other previous distinctions; or it might have reevaluated the proper placement on the

new scale of each of more than 1100 individual ALJs. It was not irrational, however, to adopt instead a conversion system that would roughly preserve, at the outset, the relative salary rankings reflected in each ALJ's placement on the General Schedule.

Moreover, because of the salary progression provisions of the 1990 Act, and because OPM's implementing regulations do not differentiate among ALJ positions in placing newly hired ALJs onto the AL scale, it was clear from the outset that under the new system any salary differences resulting from previous classifications of ALJ positions under the General Schedule would be eliminated automatically over a maximum of seven years. See 5 U.S.C. 5372(b)(3)(A) (Supp. V 1993); 5 C.F.R. 930.210(f). The conversion was a one-time occurrence, and OPM could rationally rely on the passage of that relatively short period of time to eliminate any remaining question of salary disparities among positions. Petitioner's challenge to that decision raises no issue of general or continuing legal importance that would warrant further review by this Court. See *Ticor Tit. Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1362 (1994); *Dobbs* v. *Zant*, 113 S. Ct. 835, 837 (1993) (Scalia, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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